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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN CLYDE ABEL

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE

Solicitor General

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Respondent's Brief in Opposition shows both why the court of appeals' decision is absurd and why review by this Court is needed. Explaining what the decision below will mean, respondent provides the following hypothetical (Br. in Opp. 4-5):

A more proper example of the Court's ruling would be exemplified in a case where a Klu Klux Klansman is charged with the homicide of black man. Would the defendant's membership in the Klu Klux Klan be admissible evidence? Clearly such evidence should be barred because of the great danger that a jury would convict the defendant due to his association with the Klu Klux Klan. However, this evidence would be admissible under the Ninth Circuit Court's ruling, if the defendant had espoused the beliefs of the Klu Klux Klan, and such beliefs were probative of the defendant's commission of the crime.

We submit, contrary to respondent's contention, that in the above hypothetical, evidence of the defendant's membership in the Klan would be relevant to show motive (Fed. R. Evid. 401) even if the prosecution could not produce

a witness to testify that the defendant had espoused the Klan's beliefs. And if a fellow Klansman testified on the defendant's behalf, we submit that their common membership would be admissible to show that witness's bias.

In addition, as noted in our Petition (at 15), the court of appeals' decision may cause as great injustice to the defense as to the prosecution. To modify respondent's hypothetical, suppose a black defendant were on trial and the witnesses against him were Klansmen. Would impeachment on the basis of the witnesses' membership in the Klan be barred on the ground adduced by the court of appeals that "mere membership * * * without more, has no probative value"? Pet. App. 5a.

Respondent concedes (Br. in Opp. 2) that "a witness' bias may be explored by examining the witness' relationship to the party." Common membership in a group is one such relationship. Contrary to the holding of the court of appeals and respondent's submission, membership in a group—whether the Aryan Brotherhood, the Ku Klux Klan, or a boy scout troop—often has probative value. As respondent's telling hypothetical shows, the decision below, by precluding such proof, has the potential to cause most unjust results. When probative evidence, such as membership in the Klan or Aryan Brotherhood, is held inadmissible and a guilty defendant is acquitted, it will be too late to seek review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

MARCH 1984